

STATE OF MICHIGAN
COURT OF APPEALS

VIRGINIA L. AUSTIN,

Plaintiff-Appellant,

v

DENNIS P. AUSTIN,

Defendant-Appellee.

UNPUBLISHED

November 25, 2003

No. 242426

Allegan Circuit Court

LC No. 90-013185-DM

Before: Cooper, P.J., and Markey and Meter, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order entering an amended qualified domestic relations order (QDRO). We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and defendant were divorced in 1991. At the time of the divorce defendant was employed at Michigan Bell. The parties reached a property settlement that was memorialized in a written agreement. The settlement provided that the parties agreed to the entry of a QDRO. The judgment of divorce specifically incorporated the property settlement agreement and a QDRO. Paragraph 5(a)(i) of the QDRO provided that plaintiff would receive fifty percent of defendant's normal monthly retirement benefit that had accrued as of the date of the order. Paragraph 5(a)(iii) provided that if defendant received an early retirement subsidy, plaintiff would receive a share of that subsidy in proportion to her share of defendant's normal monthly retirement benefit. Paragraph 5(a)(iv) stated that if defendant took an early retirement and received an early retirement subsidy, plaintiff's benefit would be recalculated so that she would receive a proportionate share of the early retirement subsidy. Paragraph 5(a)(v) provided that for purposes of the QDRO, the monthly early retirement subsidy was the benefit payable to defendant under the retirement plan at the time of defendant's early retirement.

In June 2000, defendant filed a motion to clarify the judgment of divorce, arguing that pursuant to the judgment, plaintiff was entitled to a fifty percent share of his normal retirement benefit but was not entitled to any portion of the early retirement subsidy he would receive upon his retirement. The trial court held that plaintiff was not entitled to any portion of defendant's early retirement subsidy, reasoning that because defendant was not entitled to an early retirement subsidy on the date of entry of the judgment, the language of paragraph 5(a)(i) of the QDRO granting plaintiff fifty percent of defendant's normal retirement benefit that had accrued during the marriage precluded an award to plaintiff of any portion of an early retirement subsidy.

Defendant later moved for entry of an amended QDRO that comported with the trial court's previous decision. The trial court found that its previous decision constituted an interpretation and not a revision of the parties' property settlement agreement and entered an amended QDRO striking the language contained in paragraphs 5(a)(i) and 5(a)(iii).

In reviewing the trial court's property division in a divorce case, we first review the trial court's findings of fact. If the trial court's findings of fact are upheld, [we] must then decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is discretionary and should be affirmed unless [we are] left with the firm conviction that the division was inequitable. The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances. [*Gates v Gates*, 256 Mich App 420, 422-423; 664 NW2d 231 (2003) (internal citations omitted).]

A property division reached by the consent of the parties and finalized in writing or on the record cannot be modified by the court. *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999). The court is bound to uphold such a settlement and cannot set it aside absent fraud, duress, mutual mistake, or severe stress. *Id.* If a settlement is ambiguous the court has the inherent power to interpret and clarify its terms if the clarification does not cause a substantive change in the rights of the parties. *Bers v Bers*, 161 Mich App 457, 464; 411 NW2d 732 (1987).

Early retirement benefits that are not vested at the time of entry of the judgment of divorce may be awarded at a later date where such an award is fair and just. MCL 552.18(2). However, "separate and distinct components of pension plans must be specifically awarded in a judgment of divorce in order to be included in a QDRO." *Quade, supra* at 224. An early retirement subsidy is a separate and distinct component of a pension plan. *Id.* at 225.

Plaintiff argues that the trial court erred by modifying the QDRO. We agree, reverse the trial court's order entering an amended QDRO, and remand this case for reinstatement of the original QDRO. The parties' property settlement agreement provided that the parties agreed to the entry of a QDRO in substantially the same form as the example appended to the agreement. The judgment of divorce specifically incorporated the property settlement and the QDRO agreed to by the parties. Paragraph 5 of the QDRO awarded plaintiff fifty percent of defendant's normal retirement benefit accrued during the marriage, as well as a proportionate share of any early retirement subsidy awarded to defendant in the event he took an early retirement. Plaintiff's share of the early retirement subsidy was to be in proportion to the amount of the normal retirement benefit to which she was entitled. No language in any section of paragraph 5 of the QDRO indicated that plaintiff would be entitled to a portion of an early retirement subsidy only if defendant were entitled to such a subsidy on the date of entry of the judgment of divorce.

Contrary to the trial court's conclusion, the fact that defendant was not entitled to receive an early retirement subsidy on the date of entry of the judgment of divorce was of no moment. Unvested retirement benefits may be considered part of the marital estate in a divorce action. MCL 552.18(2). The judgment of divorce and the original QDRO clearly provided for the award to plaintiff of a share of any early retirement subsidy to which defendant might become entitled in the future, as required. *Quade, supra*, 224-225. The trial court's entry of an amended QDRO modified the parties' property agreement absent a finding of fraud, duress, mutual mistake, or

severe stress, and caused a substantive change in the rights of the parties. *Id.* at 226; *Bers, supra*. The trial court erred by entering the amended QDRO and modifying the parties' original property agreement.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jessica R. Cooper

/s/ Jane E. Markey

/s/ Patrick M. Meter